No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

RAYMOND J. WISE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

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We do not believe that a district court decision overturning the established practice of more than forty-five years of indicting corporate officials, who have individually participated with their companies in conspiracies to violate the Sherman Act, under that Act rather than under Section 14 of the Clayton Act, can properly be characterized as raising questions so unsubstantial as not to require further argument (see Revised Rules of this Court, Rule 16(c)). The issue obviously does not cease to be substantial merely because two other district courts have followed the opinion below. Nor does it lose significance because the government might be able, where the statute

of limitations has not run, to file new indictments or informations charging the individual defendants with violation of Section 14 of the Clayton Act. For the individual defendant is subject to a substantially lesser penalty for violation of Section 14 than for violation of the Sherman Act. In addition, the joinder of a Section 14 charge against the corporate officials with the Sherman Act charge against the corporation would inevitably lead to additional procedural problems and trial complexities.[1] A brief response to some of the substantive points raised in the motion to affirm is, nevertheless, appropriate.

1. A principal argument is that since the language of Section 14 of the Clayton Act ("* * * the individual directors, officers, or agents of such corporation who shall have * * * done any of the acts constituting in whole or in part such violation * * *") is broad enough, in terms, to include any corporate official participating in a violation of the Sherman Act, Section 14 must be held to constitute a *pro tanto* repeal of the Sherman Act, regardless of the express statements to the contrary made by the sponsors of the new provision (see J.S. 11–13). This argu-

[1] Since there is virtually no previous history of indictments under Section 14 of the Clayton Act, the exact nature of these procedural problems cannot be foretold. But if, as we contend, indictments against responsible corporate officials actively participating in Sherman Act violations by their corporations have been properly brought under that Act, it is desirable to avoid the delays required to litigate the questions which would almost certainly be raised as to the application of the special procedures of Section 14 of the Clayton Act. This consideration underlines the importance of the present case.

ment is at odds with the other principal contention of the appellee that Congress intended to create a dichotomy between "corporate officials acting solely in a representative capacity" (who allegedly would be indictable only under Section 14) and "corporate officials [who] could be indicted under the Sherman Act where they had utilized the corporate form as a cover to further their own personal interests" (motion to affirm, p. 12). For it is clear that the language of Section 14 covers both classes of corporate officials. In any event the argument has no merit.

The Clayton Act in its entirety was intended to implement the Sherman Act by specifically prohibiting various anticompetitive practices, the legality of which under the Sherman Act was either unclear or doubtful. But the fact that particular conduct violates the more specific prohibitions of the Clayton Act does not establish that it does not also violate the Sherman Act. For example, conduct that violates Section 3 of the Clayton Act may also violate the Sherman Act (see *Standard Oil Co.* v. *United States*, 337 U.S. 293; cf., *Times-Picayune* v. *United States*, 345 U.S. 594, 608–10); and an acquisition that violates Section 7 of the Clayton Act may also violate Section 1 of the Sherman Act (see *United States* v. *du Pont & Co.*, 353 U.S. 586; cf., *United States* v. *Columbia Steel Co.*, 334 U.S. 495). This overlapping of statutory remedies is by no means unique. As this Court stated in *Times-Picayune*, *supra*, at p. 609, a tying arrangement which is banned by either Section 3 of the Clayton Act or Section 1 of the Sherman Act also "transgresses § 5 of the Federal

Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 690–694 (1948); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463 (1941)." Thus, the fact that Section 14 of the Clayton Act was broadly drafted in an effort to insure against any gap in the liability of corporate officials does not restrict the government to indicting corporate officials under that provision where their acts also violate the Sherman Act.

There is no merit to appellee's contention (motion to affirm, p. 7) that its interpretation of Section 14 must be accepted, since otherwise that section may not have any independent meaning. For whether or not that section today reaches any conduct by corporate officials that does not also violate the Sherman Act, Congress believed that it was extending the then-existing scope of the Sherman Act when it enacted Section 14 in 1914. It also indicated that it did not intend to repeal the existing prohibitions of Section 1 of the Sherman Act—prohibitions which, at that time, had already been held to cover corporate officials acting in their corporate capacity (see below.) It was argued in 1914 that, particularly in view of the provisions of the existing aiding and abetting statute (then Section 332 of the Criminal Code, 35 Stat. 1152 (1909), now 18 U.S.C. 2(a)), the enactment of Section 14 might not significantly extend the existing liability of corporate officials. See, *e.g.*, 51 Cong.

Rec. 16283. And, in the light of developments in the law of conspiracy since 1914, there may be relatively few circumstances where a corporate official could be convicted under Section 14 because of his participation in a conspiracy in restraint of trade in which his corporation was involved, but could not also be convicted as a conspirator under Section 1 of the Sherman Act. It is this circumstance, rather than the fact that up to 1955 both sections had the same penalty, which accounts for the almost universal practice of indicting individual defendants under the Sherman Act, rather than under Section 14 of the Clayton Act.

2. As we pointed out in the jurisdictional statement (pp. 7–10), it was established prior to 1914 that corporate officials, including those who could not conceivably be classified as utilizing the corporations as a front for their own personal activities, could be prosecuted under the Sherman Act where they had individually participated as conspirators. See, e.g., *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (S.D. N.Y.); *United States* v. *Patterson*, 201 Fed. 697 (S.D. Ohio), affirmed, 222 Fed. 599 (C.A. 6). This conclusion is not negatived by the fact that a Congressional Committee in 1900, at a time when the Sherman Act was virtually moribund and there had been little history of its application to individuals, recommended an amendment to make the definition of "person" in the Sherman Act expressly include "agents, officers, and attorneys" of corporations. The government in its appeal to this Court in *United States* v. *Winslow*, 227 U.S. 202, did not adopt appellee's position, or its interpretation of

the *MacAndrews & Forbes* case as limited to situations where the officials were using a dummy corporation for their personal purposes. As detailed in the jurisdictional statement (p. 9), the district court in the *Winslow* case rejected a demurrer based upon the claim that individuals who "are only officers or directors" of a corporation cannot violate the Sherman Act (195 Fed. 578, 581). However, in the government's appeal to this Court from the district court's dismissal of the indictment, an issue was presented whether the indictment charged the individual defendants with sufficient personal participation in the alleged violations to make them principals. It was in this context that language similar to that cited in the motion to affirm (p. 13) was used in the government's brief.[2] But an examination of the cases cited by the government (and listed at 227 U.S. 204) makes clear that all that was being argued in *Winslow* was that, where the individuals indicted are the controlling managers of the corporations or otherwise responsible for the illegal acts, they, as well as the

[2] The statement in the government's brief (No. 620, Oct. Term, 1912, p. 12) actually read:

> It is well settled that individuals are criminally liable and subject to indictment for acts done in corporate form where the individuals themselves personally do or procure to be done such things; and it is no objection to the indictment that it alleges that the defendants did the acts complained of in the name of and through the instrumentality of a corporation. (Rec., p. 76 [the portion of the lower court decision (195 Fed. at 581) holding that corporate directors "acting an immediate, special part in the proceedings" are liable as principals]; *U.S.* v. *Swift*, 188 F.R. 92, 98; * * *.)

corporation, can be held criminally liable.[3] The government did not suggest that corporate officials who were not controlling managers, but who had directly participated in the conspiracy, could not be prosecuted under the Sherman Act.

3. Appellee argues (motion to affirm, pp. 10–11) that the judicial history of Section 14 of the Clayton Act prior to the instant case supports its distinction between corporate officials acting on their own behalf and those acting in a representative capacity. The fallacy of this argument with respect to the officials involved in *United States* v. *General Motors Corp.*, 26 F. Supp. 353, 355 (N.D. Ind.), is readily apparent. Those officials were not charged, and in view of the nature of General Motors could not have been charged, with acting in anything other than their representative capacity—except in the sense that all corporate officials charged with individual participation in a conspiracy to violate the Sherman Act are acting for themselves as indirect beneficiaries of the

[3] Thus, in *People* v. *Clark*, 8 N.Y. Cr. Rep. 179, 194–5, 212, it was held that the president and directors of the New York, New Haven & Hartford Railroad could be criminally indicted for violating the Car Stove Heating Act if they were charged with doing the illegal acts or counseling, aiding or abetting the railroad to violate the law. In *People* v. *Duke*, 44 N.Y. Supp. 336, 337–39, an indictment charging 9 officers and agents of the American Tobacco Co. with a common law conspiracy to monopolize and restrain trade in the manufacture and sale of cigarettes was upheld. See also *People* v. *White Lead Works*, 82 Mich. 471, 479 (officers of paint manufacturer); *Crall* v. *Commonwealth*, 103 Va. 855, 859–60 (regional officers of an installment sales corporation doing business in 22 states).

advantages they secure for their corporation. The language cited by the appellee (motion to affirm, p. 11) obviously means only that the indictment charged the defendant officials with active and knowing participation in the alleged offense rather than merely being officers of the defendant corporations.

Appellee's statements with respect to the several decisions stemming out of the 1924 indictment of 52 corporations and 49 corporate officials for violating the Sherman Act through a combination and conspiracy in restraint of trade in malleable iron castings simply cannot be squared with the actual facts. Thus, appellee contends that the district court in *United States* v. *National Malleable and Steel Castings Co.*, 6 F. 2d 40 (N.D. Ohio), "avoided ruling on the question" of whether Section 1 of the Sherman Act or Section 14 of the Clayton Act was applicable to the individual defendants (motion to affirm, p. 10). In fact, the court, while holding that the "criminal participation of the individual defendants * * * is sufficiently averred, within the authorities and within the terms" of Section 14 of the Clayton Act (6 F. 2d at 41), expressly concluded that "if the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of section 1 of the Sherman Act" (*ibid.*). Moreover, while neither of the opinions in the related cases of *Meehan* v. *United States*, 11 F. 2d 847 (C.A. 6), and *United States* v. *Mathues*, 6 F. 2d 149 (E.D. Penna.), "interpreted the indictment as intending to lay charges under

Section 14", as appellee suggests (pp. 10–11),[1] this Court, in *United States ex. rel. Hughes* v. *Gault*, 271 U.S. 142, the one case involving the indictment in the *National Malleable* proceeding to reach it, expressly held that Hughes, one of the 49 individual defendants, "was indicted for violation of the Anti-trust Act of July 2, 1890" (*id.* at p. 148), and that "[t]he relator [Hughes] is not left in doubt of the effort of the grand jury to present him as criminal under the Sherman Act" (*id.* at 151).

CONCLUSION

The question presented is an important one and probable jurisdiction should be noted.

Respectfully submitted.

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[1] In the *Mechan* case the court held only that the Sherman Act indictment against the individual involved had sufficiently charged him with personal participation in the offense "either under the general principles involved or under section 14 of the Clayton Act" (11 F. 2d at 850). In the *Mathues* case the court, after describing the indictment as having charged both the corporations and the individuals with engaging in an illegal combination in restraint of interstate commerce under the Sherman Act (6 F. 2d at 150–151), merely cites Section 14 of the Clayton Act in support of its conclusion that the indictment sufficiently charged the defendants with actual participation in the alleged illegal combination (*id.* at [illegible]).

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